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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DEA'VONTEE THOMPSON, a Minor, etc., et al.,

Plaintiffs and Appellants,

v.

NORTHWEST PHYSICIANS MUTUAL INSURANCE COMPANY,

Defendant and Respondent.

E038890

(Super.Ct.No. SCVSS117398)

OPINION

APPEAL from the Superior Court of San Bernardino County. John P. Wade, Judge. Affirmed.

Nathaniel J. Freidman for Plaintiffs and Appellants.

Sinnott, Dito, Moura & Puebla, Blaise S. Curet, David M. Harris, and Stephen R. Wong, for Defendant and Respondent.

INTRODUCTION

Plaintiff Lavonda Williams sued her doctor, George Small, for professional negligence which allegedly occurred during her pregnancy and during the birth of her

child, Dea'Vontee Thompson.[1] Dr. Small did not contest the action because he had filed for bankruptcy. Plaintiff then obtained a default judgment of approximately 17 million dollars.

Plaintiff, as a judgment creditor, then filed this suit against Northwest, the alleged insurer of Dr. Small, to recover damages from Northwest.

Northwest admitted that it had issued a professional liability policy to Dr. Small, but contended the policy was a claims made policy, and no claim was made during the time the policy was in effect.

Following plaintiffs' unsuccessful summary judgment motion, Northwest brought its own motion for summary judgment. Northwest's motion was granted and the trial court dismissed the action. Plaintiffs appeal, contending the trial court erred in granting defendant's summary judgment motion. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

A. *Summary Judgment*

A defendant's motion for summary judgment must be granted when the evidence shows that there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc.[2] § 437c, subd. (c).) "In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections

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[1] Plaintiff sued in her individual capacity and as guardian ad litem for her baby.

[2] All further statutory references will be to the Code of Civil Procedure unless otherwise indicated.

have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." (§ 437c, subd. (c).)

"From commencement to conclusion, the moving party bears the burden of persuasion that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.

Initially, the moving party bears a burden of production to make a prima facie showing of the nonexistence of any genuine issue of material fact. If he carries his burden of production, he causes a shift: the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a genuine issue of material fact. How each party may carry his burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial. Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not. By contrast, if a defendant moves for summary judgment against such a plaintiff, he may present evidence that would require such a trier of fact *not* to find any underlying material fact more likely than not. In the alternative, he may simply point out—he is not required to present evidence (see Fed. Rules Civ.Proc., rule 56(b), 28 U.S.C.)— that the plaintiff does not

possess, and cannot reasonably obtain, evidence that would allow such a trier of fact to find any underlying material fact more likely than not." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845, fn. omitted.)

In the insurance context, " '[t]he insurer is entitled to summary adjudication that no potential for indemnity exists . . . if the evidence establishes as a matter of law that there is no coverage. [Citation.] We apply a de novo standard of review to an order granting summary judgment when, on undisputed facts, the order is based on the interpretation or application of the terms of an insurance policy.' [Citations.] [¶] In reviewing de novo a superior court's summary adjudication order in a dispute over the interpretation of the provisions of a policy of insurance, the reviewing court applies settled rules governing the interpretation of insurance contracts." (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390.)

B. *Northwest's Motion for Summary Judgment*

Northwest filed its motion for summary judgment on grounds that there was no coverage under the claims made policy it had issued to Dr. Small because the claim had not been reported to Northwest during the time the policy provided coverage for Dr. Small's alleged malpractice.

Northwest supported its summary judgment motion by relying on the policy itself and the declaration of Sandra Tunnell, its vice president in charge of its Claims Department.

The policy attached to Ms. Tunnell's declaration covered the period from January 1, 2001, through January 1, 2002. It states on its declarations page it is a claims made

policy. Accordingly, the coverage agreement states: "A claim from any covered medical incident must be reported to us while this policy, renewal of this policy or reporting endorsement is in effect. The medical incident must have occurred within the policy territory on or after the retroactive date." Endorsement 2 states: "Except to the extent otherwise provided herein, coverage under this policy is limited to liability for only those claims that are first made against you and reported to us while the policy is in force."

In her declaration, Ms. Tunnell states, based on a review of the company's records, the company "never received written notice from Dr. Small during the Policy's effective period that Plaintiffs had made a claim." Northwest's attorney also filed a declaration with excerpts from Dr. Small's deposition testimony. Dr. Small testified in his deposition that he did not recall ever notifying Northwest of the Thompson claim.

Ms. Tunnell also declares that Northwest sued Dr. Small on December 18, 2000, to rescind the policy. The litigation ended with a settlement agreement signed in May 2001. The settlement agreement provided that the Northwest policy would be terminated effective July 1, 2001, and that Dr. Small would not seek to purchase reporting endorsement coverage.[3] Accordingly, the policy was terminated on July 1, 2001.

Finally, Ms. Tunnell declares that Northwest did not receive notice of plaintiffs' claim until receiving a letter from plaintiffs' counsel dated March 15, 2004.

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[3] According to Ms. Tunnell, reporting endorsement coverage, otherwise known as tail coverage, would extend the time for reporting claims under the policy. For examples of the importance of obtaining such coverage, see *Abifadel v. Cigna Ins. Co.* (1992) 8 Cal.App.4th 145, 149 and *Sinott v. Latts* (1992) 6 Cal.App.4th 923, 927.

Northwest's summary judgment motion clearly made the requisite prima facie showing of a complete defense to the action, i.e., a lack of coverage due to a lack of timely notice of claim under a claims made policy. The burden then shifted to plaintiffs to show the existence of a genuine issue of material fact. We therefore turn to plaintiffs' response to Northwest's summary judgment motion.

C. *Plaintiffs' Response to Northwest's Summary Judgment Motion*

In their response to Northwest's summary motion, plaintiffs did not contend the policy was not a claims made policy, nor did they contend that timely notice of their claim was given to the insurance company.[4] Instead, they argued that (1) Northwest had ignored events occurring after issuance of the original policy; (2) the settlement agreement supports their contentions; and (3) a 20-page expert declaration raised factual issues.

Under the first heading, plaintiffs allege that Dr. Small was first insured in 1997; that two malpractice lawsuits were filed against him in 2000; that Northwest rescinded the policy in effect from January 1, 2000, to January 1, 2001, on November 27, 2000, and filed a rescission action on December 18, 2000. Nevertheless, Northwest renewed Dr. Small's policy for the period January 1, 2001, through January 1, 2002. Plaintiff Dea'Vontee Thompson was born on January 25, 2001, and the alleged malpractice

[4] Plaintiffs concede, "The opposition filed is the only way the Defendant Insurer might argue no coverage 'for the Thompson and Williams claims.' That is, to point to the policy alone and assert its terms and conditions and thereby claim, 'no coverage.' "

occurred before, during, and after delivery. The settlement agreement was signed on May 17, 2001.

Under the second heading, plaintiffs argued that the settlement agreement was "an agreement to defend and indemnify Dr. Small for any events that occurred up to 7-1-01 that could lead to a malpractice claim." Plaintiffs rely on paragraph 21 of the settlement agreement, which states: "Dr. Small is presently unaware of any other claims which will or might be brought against him during the Policy Period of the NPM Policy. If any claims are forthcoming, this agreement does not release NPM from the duty to defend and indemnify Dr. Small under the policy." Plaintiffs apply the principles of contract interpretation to the settlement agreement and conclude that it is the settlement agreement which protects Dr. Small (and indemnifies plaintiffs) for all claims that arise from his medical practice until July 1, 2001.[5]

Under the third heading, plaintiffs argued that Northwest breached its duty to investigate any claims submitted to it before denying coverage. In support of this argument, plaintiffs submitted a 20-page expert declaration by David Peterson. Mr.

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[5] We agree with Northwest that this interpretation not only has the effect of eliminating all other provisions of the insurance contract, but it also turns the policy into an occurrence policy. The trial court understandably refused to rewrite the insurance contract to excuse the lack of notice. But even if we focus solely on paragraph 21 of the settlement agreement, we would disagree with plaintiffs. It plainly refers to claims that might be brought during the time the policy was in effect, i.e., from the date of the settlement agreement through the expiration date of July 1, 2001. As to those claims, Northwest retained the duty to defend and the duty to indemnify in appropriate cases. Nothing in paragraph 21 would extend coverage for plaintiffs' claim, which was made years later. The parties' intent is clearly shown by their agreement that Dr. Small will not seek reporting endorsement coverage for future claims.

Peterson, who is a highly qualified attorney and insurance claims expert, reviewed the case and opined, "the Insurer acted below the standard of care for the insurance industry in handling the claims presented in that the handling was unreasonable" because (1) Northwest did not adequately investigate the claim before denying it; (2) Northwest did not properly communicate with the insured; (3) Northwest did not properly interpret coverage to provide a defense to plaintiffs' lawsuit against Dr. Small; (4) "Insurer did nothing in regard to its duty to evaluate coverage and damage and attempt settlement in a reasonable fashion." Finally, Mr. Peterson concluded that Northwest violated Insurance Code section 790.03, subdivision (h)(6) by forcing the insured to file a lawsuit to obtain benefits.

Northwest objected to large portions of Mr. Peterson's declaration, primarily on grounds that Mr. Peterson was offering inadmissible legal opinions. The trial court sustained all of Northwest's objections to Mr. Peterson's declaration. And, as noted above, the trial court granted Northwest's summary judgment motion and dismissed the action.

DISCUSSION

On appeal, plaintiffs first argue that the trial court's evidentiary ruling excluding large portions of Mr. Peterson's declaration was a violation of due process. As noted above, the trial court found the declaration irrelevant and apparently agreed with Northwest that the cited portions contained inadmissible legal opinions.

We agree with Northwest and the trial court that Mr. Peterson's declaration was not relevant because the "argument puts the cart before the horse." That is, the plaintiffs

must first establish that they had a covered claim before arguing that their claim was improperly handled. Northwest quotes *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1: "It is clear that if there is no *potential* for coverage and, hence, no duty to defend under the terms of the policy, there can be no action for breach of the implied covenant of good faith and fair dealing because the covenant is based on the contractual relationship between the insured and the insurer. [Citation.] As the *Love* [*v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136] court observed, its 'conclusion that a bad faith claim cannot be maintained unless policy benefits are due is in accord with the policy in which the duty of good faith is [firmly] rooted.' [Citation.] The legal principle is based on general contract law and the long-standing rule ' "that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." ' [Citations.]" (*Id.* at p. 36.)

Plaintiffs cite *Kelly v. New Far West Savings* (1996) 49 Cal.App.4th 659, but that case, which deals with abuses in the granting of motions in limine followed by the granting of a motion for nonsuit, is not persuasive authority in the present situation. While we agree with plaintiffs that expert testimony is admissible in actions on an insurance policy, plaintiffs first had to establish that they had a covered claim. They failed to do so.

At oral argument, plaintiffs relied on *Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784 (*Amato*). That case applied the rule stated in *Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263; i.e., that an insurer has a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. (*Amato*, at p.

1789.) Plaintiffs argued that the insurance company has a duty to investigate to determine whether there is a potential for liability and, according to the Peterson declaration, it failed to do so. Respondent answers this argument by pointing out that Northwest did investigate by reviewing its files and finding no notice of a claim during the policy's effective period. Without such a notice, there was simply no potential for coverage.

Plaintiffs' counsel quoted at length from *Amato* at oral argument regarding the alternatives available to the insurance company in coverage disputes, but counsel did not comment on the last stated alternative: that "it may simply deny the request and take its chance that the trier of fact in an action alleging bad faith breach of the contractual duty to defend will agree that no defense was owed [citation]." *Amato, supra,* 18 Cal.App.4th at p. 1792.) In the summary judgment context here, Mercury presented evidence that there was no potential for coverage, and plaintiffs simply failed to present evidence showing any such potential.

Plaintiffs' counsel also cited *Wilson v. 21st Century Ins. Co.* (2006) 136 Cal.App.4th 97, 104. Review has been granted in that case and the opinion depublished. (Review granted April 26, 2006, S141790.) It is therefore no longer citable precedent.

Additionally, plaintiffs' counsel cited the recent case of *Safeco Ins. Co. of America v. Superior Court* (2006) 140 Cal.App.4th 874. In that case, the court held, in an action by a settling insurer against a nonsettling insurer, the settling insurer must make a prima facie showing of coverage before the burden shifts to the nonsettling insurer to show the absence of coverage. (*Id.* at p. 881.) This holding is merely an application of the rule

that a nonparticipating insurer may raise coverage issues "as affirmative defenses in an action in which the settling insurers seek equitable contribution [citations] . . . ." (*Ibid.*)

There was no prima facie showing of coverage, or a potential for coverage, herein. Northwest made a prima facie showing of lack of coverage, and plaintiffs failed to submit any evidence of coverage, or any evidence which would even raise a potential coverage issue.

Secondly, plaintiffs argue that conflicting inferences were present which raised triable issues of material fact. (§ 437c, subd. (c).) Plaintiffs fail, however, to tell us what these conflicting inferences might be. They mention the rescission action, which was apparently based on Dr. Small's failure to include pending malpractice actions in his application for insurance, but the relevance of that action is unclear. They also mention the series of events which were described in Mr. Peterson's declaration, but they do not tell us how those events raise any conflicting inferences. As noted above, those events primarily relate to claims handling practices, and those practices are irrelevant without a prior showing of coverage.

Finally, plaintiffs complain that Northwest made a unilateral decision to deny coverage to plaintiffs, even though Northwest had filed a declaratory relief action to rescind the policy in December 2000. Plaintiffs appear to argue that every denial of a claim for lack of coverage must be followed by a declaratory relief action, but neither the statutes nor the case law require such a multitude of actions. Although the policy provides that Northwest could cancel Dr. Small's insurance for misrepresentations in the policy application, the December 2000, rescission action was necessary because it sought

a declaration that Northwest was not required to defend or indemnify plaintiffs in the two actions which had not been disclosed to it.[6]

Third, plaintiffs allege that their late notice should not be fatal because Northwest cannot demonstrate prejudice from the late notice. Plaintiffs cite *O'Morrow v. Borad* (1946) 27 Cal.2d 794, 800, to support their contention that the notice prejudice rule is applicable. We are unable to find the portion quoted by plaintiffs on the page cited. That page deals with the question of whether insurers may be liable for a judgment, even though they are not permitted to mount a defense under the unusual situation in that case. The cited page also deals with the principle that a contract will be construed to avoid forfeiture. (*Id.* at p. 800.)

Respondent cites *Pacific Employers Ins. Co. v. Superior Court* (1990) 221 Cal.App.3d 1348: "California's 'notice prejudice' rule operates to bar insurance companies from disavowing coverage on the basis of lack of timely notice unless the insurance company can show actual prejudice from the delay. The rule was developed in the context of 'occurrence' policies. [Citations.]" (*Id.* at p. 1357.) The court focused on the application of the notice prejudice rule to claims made policies and found that: "The effect of applying the 'notice prejudice rule' as developed in *Campbell* and its progeny to

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[6] Thus, Northwest's subsequent agreement to provide a defense and indemnification in those two actions was a significant benefit to Dr. Small. This fact tends to negate plaintiffs' trial court argument that the cancellation of the policy was wrongful, or the result of economic coercion. As plaintiffs' argued rather colorfully, "It is crystal clear that the Settlement Agreement was no more voluntarily entered into, than the poor devil, lying on the gurney, consents to the injection of lethal chemicals into his vein."

the facts of this case would be to convert PEIC's 'claims made' policy into an 'occurrence' policy. In the absence of actual prejudice from late reporting, which also defeats coverage under an 'occurrence' policy, all negligence during the policy period would be covered." (*Id.* at p. 1358.) The court explained: " 'Claims-made policies . . . require that notification to the insurer be within a reasonable time. Critically, however, claims-made policies require that notice be given *during the policy period* itself. When an insured becomes aware of any event that could result in liability, then it must give notice to the insurer, and that notice must be given "within a reasonable time" or "as soon as practicable"— at all times, however, during the policy period . . . . [¶] Coverage depends on the claim being made and reported to the insurer during the policy period. Claims-made . . . policies are essentially *reporting* policies . . . . If a court were to allow an extension of reporting time after the end of the policy period, such is tantamount to an *extension of coverage* to the insured gratis, something for which the insurer has not bargained. This extension of coverage, by the court, so very different from a mere condition of the policy, in effect rewrites the contract between the two parties. This we cannot and will not do.' (Italics in the original.) [Citations.]" (*Id.* at pp. 1358-1359.)

Northwest also cites *Helfand v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 869: "The hallmark of a 'claims made' policy is that exposure for claims terminates with expiration or termination of the policy, thereby providing certainty in gauging potential liability which in turn leads to more accurate calculation of reserves and premiums. The benefit to the insureds is that the insurer can make coverage more available and cheaper than occurrence policies. [Citation.]" (*Id.* at p. 888.)

While plaintiffs' argument is understandable as an attempt to excuse the failure of Dr. Small or anyone else to notify the insurance company of plaintiffs' claim within the policy period, there is no evidence to even suggest Dr. Small knew of plaintiffs' claim before plaintiffs filed suit against him on April 25, 2003. In any event, plaintiffs have simply failed to show that a claim was made during the term of the claims made policy.[7]

Fourth, plaintiffs argue that section 437c, subdivision (b), is an unconstitutional denial of procedural due process. They argue they have a constitutional right to present evidence to a trier of fact. They argue that this right was violated when the trial court found that "defendant's objection that plaintiff's separate statement of facts fails to comply with Rules of Court, [Rule] 342, [subdivision] (f), by not properly identifying the controverting evidence, is sustained."

A review of plaintiffs' separate statement of disputed material facts shows that it utterly failed to comply with the requirements of section 437c, subdivision (b)(3): "The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. Each material fact contended by the opposing party to be disputed shall be

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[7] Plaintiffs argue that the settlement agreement only dealt with the 2001 policy, thus extending the policy period from July 1, 2001 to January 1, 2002. But this argument does not help them as their claim was not reported until 2004. They are therefore reduced to arguing that there was no prejudice from the lengthy delay in reporting the claim to Northwest.

followed by a reference to the supporting evidence. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion."

Contrary to plaintiffs' contentions, they had the opportunity to present evidence to support their claims. They merely failed to do so, presumably because no such evidence exists. No due process violation has been shown.

CONCLUSION

Northwest's summary judgment motion established that the policy in question was a claims made policy, and that no claim was made during the time the policy was in effect. Plaintiffs' response failed to make a prima facie showing of any factual issue. Accordingly, the trial court properly decided that plaintiffs were not covered under the policy and Northwest was entitled to summary judgment as a matter of law.

DISPOSITION[8]

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ RAMIREZ
P.J.

We concur:

/s/ McKINSTER
J.

/s/ GAUT
J.

[8] On November 23, 2005, plaintiffs requested that we take judicial notice of the Register of Actions in the underlying action, Dea'Vontee Thompson, a minor, et al. v. San Bernardino Community Hospital, et al., case number SCVSS 102641. Defendant Northwest objected on grounds that the document is irrelevant. By Order filed December 16, 2005, we reserved decision for consideration with this appeal. Although the document was not cited in plaintiffs' briefs, and we see little relevance to it, we will nevertheless grant plaintiffs' request for judicial notice.